BRIEF OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

Nos. 128 and 196.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, PETITIONER,

v.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, RESPONDENT.

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, PETITIONER,

v.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, RESPONDENT.

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BRIEF OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY

By agreement between counsel the questions presented in both of the above causes will be covered in this Brief.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY will be designated as "PETITIONER" throughout this Brief notwithstanding that it is "RESPONDENT" in Cause No. 196, and WILLIAM R. McCOMB, Petitioner in Cause No. 196, will be referred to throughout this Brief as "ADMINISTRATOR".

OPINIONS BELOW

The judgment of the District Court in favor of Petitioner was reversed by the Court of Appeals pursuant to the majority opinion of Judges Bratton and Murrah (R. 127), with Judge Phillips dissenting (R. 134). The majority and dissenting opinions of the Court of Appeals (R. 127-137) are reported in 167 Fed. (2d) p. 941. The opinion of the District Court appears in the record at page 99, et seq., and the Findings of Fact, Conclusions of Law and Decree of the District Court appear in the record at pages 99-122.

JURISDICTION

The judgment of the Court of Appeals was entered April 23, 1948, with petition for rehearing (filed by the Administrator) denied May 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted October 11, 1948.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, et seq., Title 29, U. S. C. A., Sec. 201, et seq.) (hereinafter referred to as the Act). The pertinent provisions of the Act are set forth in the Appendix, infra, pp. a, b, c and d.

CONCISE STATEMENT OF THE CASE

The Administrator of the Wage and Hour Division of the Department of Labor filed a complaint in the District Court against the Petitioner charging the Petitioner with violating the Act by failing to pay certain of its employees time and one-half for statutory overtime and by failing to keep records as required by the Act. An injunction was sought restraining continued violation. The Petitioner denied coverage under the Act. The District Court held that all the employees of the Petitioner involved, except one, were engaged in commerce or in the production of goods for commerce and that all of such employees were engaged in agriculture and, therefore, exempt under Subdivision (6) of Section 13 of the Act. The District Court, therefore, dismissed

the action and the Administrator appealed. The Court of Appeals, one Judge dissenting, reversed the District Court and held that the Petitioner's employees are engaged in the production of goods for commerce and are not within the agricultural exemption of the Act.

The case was submitted on agreed stipulation of facts (R. 11-83). Briefly summarized, the facts are as follows:

A number of years back the owners of certain dry, grazing or unproductive lands in several counties north and west of Denver, Colorado, wishing to convert their lands into irrigated farm lands, planned and conceived the construction of an irrigation system, by means of which water would be diverted from the public streams in Colorado and impounded in and carried through the reservoirs and ditches of the irrigation system and distributed therefrom for the irrigation of this land. Accordingly, the Petitioner was organized and incorporated under the laws of the State of Colorado *as a mutual ditch company* by the owners of this land and the irrigation system was constructed, consisting primarily of four large storage reservoirs, a number of small reservoirs and from 300 to 400 miles of irrigation ditches or canals, all located in Colorado, through which approximately 100,000 acres of land are irrigated, in whole or in part, with water diverted from the public streams and impounded in and carried through the reservoirs and ditches of the system. The record title to the land upon which the reservoirs and canals are located stands in the name of Petitioner.

Acting under the Constitution and Statutes of the State of Colorado, "appropriations" of water had been made from the public streams which give the right to the appropriators of such water to divert the same from the public streams in order of time or priority as determined by "adjudication decrees" entered by courts of the State of Colorado. These decrees permit this water to be diverted from the public streams and used for irrigation purposes only.

As stated above, Petitioner is a mutual ditch company. It has 10,500 shares of authorized capital stock. Each share entitles the owner thereof to an equal and pro rata share

with every other share of the available supply of water in the division of the system to which such water is allocated. Each year the stockholders (who are the owners of the land who organized Petitioner to secure their irrigation water or their successors in interest) make an annual assessment upon the outstanding stock for the purpose of raising money necessary to defray the expenses incident to the maintenance and operation of the system and for the payment of the principal and interest on the outstanding bonds of the company, which bonds were issued in connection with the construction of the system or the acquisition of water rights. The proceeds of the assessments constitute the sole source of income of the company, with the exception of incidental income from rents for duck hunting and similar purposes on some of the reservoirs, the receipts of which operate to reduce the amount of the annual assessments. Payment of the assessments is a condition precedent to the right of a stockholder to receive water allocated to his stock. The company does not sell water and does not carry water for hire. It does not and cannot make a profit and it does not pay dividends. It is purely a mutual ditch company organized and existing under particular statutes of the state of Colorado relating to such corporations, for the sole purpose of owning, maintaining and operating a system of irrigation canals and reservoirs for the purpose of diverting water from the public streams of Colorado and transporting such water through said canals and impounding same in said reservoirs and distributing same from said canals and reservoirs to its individual stockholders or their nominees, for the irrigation of the farm lands under its irrigation system. Its stock is the evidence of ownership or the muniment of title showing the ownership of the water right and canals and reservoirs by the stockholder.

Irrigation is essential to the proper raising of crops on the lands of Petitioner's stockholders. Petitioner employs reservoir tenders, ditch riders and operator of a dragline used in connection with the maintenance and repair of the reservoirs and canals and from time to time common laborers for special maintenance work. The number of such employees ranges from 16 to approximately 26. The reservoir tenders and ditch riders, collectively and interchangeably, tend to the

diverting of the water from the streams, to its storage and to its conduct through the canals and into the laterals of the farmers which extend from the farms to the canals of the system. They patrol the reservoirs, canals and other appurtenant structures and keep the property in good operating order. The work of the employees is essential to the irrigation of the lands of the farmer stockholders of Petitioner.

In numerous work weeks in the year some of these employees work in excess of 40 hours and are not paid for the overtime at the rate of one and one-half times their regular pay.

The water secured by the farmer stockholders of Petitioner through this system is used for irrigation purposes on the stockholders' farm lands in connection with the tillage of the soil and the production, cultivation, growing and harvesting of a wide variety of agricultural crops. These farm lands are highly productive and such high degree of productivity results in a substantial degree from the irrigation thereof by the use of this water by the individual farmers under the usual practices of all farmers producing agricultural crops under this irrigation system. This irrigation water is necessary for these agricultural purposes, and if this water were not available and used on the land of Petitioner's stockholders this land would cease to be irrigated farm land and would become non-irrigated, grazing or other class of land.

The complaint filed by the Administrator (R. 4) expressly alleges that *Petitioner's employees* are engaged "in processes and occupations necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other commodities" and that the water secured through Petitioner's system "is used and utilized * * * in the irrigation and production of corn * * * and other commodities * * *". These facts were likewise stipulated (R. 17, et seq).

The Stipulation of Facts in part provides:

> "15. The farm lands irrigated by water so distributed by defendant through its irrigation system are highly productive, and such high degree of pro-

ductivity results in a substantial degree from the irrigation thereof by the use of such waters by the individual farmers under the usual practices of all the farmers producing agricultural crops under defendant's irrigation system. On these irrigated farm lands there are planted, grown and produced in large quantities a wide variety of agricultural crops, such as sugar beets, wheat, corn and other grains, potatoes, peas, beans and other crops; and such irrigation water is necessary to and is used for the growth and production of such crops. If such irrigation water were not available and used on such land, it would cease to be irrigated farm land; and it would become non-irrigated farm land, grazing land or other class of land.

"16. The water collected, run and delivered by the defendant through the labor of certain of its employees to the individual farmers under the defendant's irrigation system, in manner as elsewhere explained in this stipulation is used by the individual farmers on their farm lands for irrigation purposes in connection with the tillage of the soil and the production, cultivation, growing and harvesting of the aforementioned agricultural crops. The distribution and delivery of such water by the defendant to the individual farmers into the farmer's individual lateral has been and is being made substantially in the manner provided for in defendant's By-Laws. The defendant has exercised control over the diversion headgates or weirs on or along its canals, through which diversion headgates or weirs water is diverted to the individual farmers for their use in irrigation substantially in the manner as specified in the By-Law." (R. 17-18)

It is further provided in the Stipulation that reservoir tenders perform maintenance work upon the Petitioner's storage reservoirs and also operate the intakes and outlets of such reservoirs and during the irrigation season release from storage such water as is available to fill the current requirements of the farmer-stockholders who are entitled to the water (R. 19) and that Petitioner's ditch riders during the irrigation season receive orders and demands for water

from the farmers along particular sections of the canal and then set headgates or weirs on Petitioner's canal so as to divert the water called for into the farmers' individual laterals and, further, both reservoir tenders and ditch riders, collectively and interchangeably, keep the canals of Petitioner free from weeds, rubbish and sand and in good repair for the free and uninterrupted flow of water therethrough and keep the reservoirs, diversion headgates and weirs in good repair and operating order, and conduct and run the water through and out of Petitioner's canals and reservoirs and through diversion headgates and weirs into the farmers' individual laterals (R. 20).

Neither Petitioner nor any of its stockholders sell or distribute any agricultural product in interstate commerce. However, in raising these agricultural products, the stockholders do know that a substantial part of them sold locally to purchasers in Colorado, such as sugar beets, corn, beans, etc., will be processed in Colorado by the purchasers and the processed products, in substantial amounts, will be shipped outside the State of Colorado in interstate commerce, and in some instances the farmer stockholders of Petitioner know that certain of their crops sold to local purchasers will thereafter, by such purchasers, without processing, be shipped interstate.

Under the laws of the State of Colorado and practices arising thereunder, taxes are not separately levied upon the irrigation system of a mutual ditch company, such as Petitioner, or the water or water rights connected therewith, but such irrigation system and water rights are deemed a part of the lands irrigated through the system and such lands are valued for tax purposes as irrigated land and the value of the water rights merged into the value of the irrigated lands.

As to Coler, the bookkeeper-accountant (Cause No. 196), it was stipulated that he had charge of and kept the Company books, including receipts and disbursement ledgers, bank and financial account ledgers for the activities of the Company; that he examined and checked the daily diary for work reports from each ditch rider or lake tender, for each day, and apportioned the total time shown by the monthly time and work sheets among the different accounts against

which the work was charged; that in the absence of the secretary, the bookkeeper-accountant has charge of and keeps the records showing the assessments paid by the stockholders of the Company, and the records relating to the delivery of water, and that the records and reports required by State and Federal law were and are prepared by him; that the work performed by the bookkeeper-accountant is necessary in the conduct of Petitioner's business and to the proper keeping of the Petitioner's records and accounts (R. 22-23).

The District Court found that the Petitioner is merely the agent of its stockholders and that the employees of Petitioner have been and are, in truth and in fact, through and by reason of this agency, for all intents and purposes, employees of the farmer stockholders of Petitioner and are in practices and occupations necessary to the production of agricultural and horticultural crops and commodities (R. 119).

The District Court found that all of Petitioner's employees involved, with the exception of the bookkeeper-accountant, were engaged in the production of goods for commerce within the meaning of the Act, but further found that all of said employees were "employed in agriculture" as defined in the Act, and therefore, exempt from its coverage. Upon these findings the complaint of the Administrator was dismissed.

The Court of Appeals held that the said employees of Petitioner are engaged in the production of goods (agricultural) for commerce within the meaning of the Act, but by a two to one opinion reversed the District Court and held that said employees are not employed in "agriculture" as defined in the Act and further held that the question of the status of the bookkeeper-accountant of the Company, whose salary subsequent to the time of trial had been increased to more than two hundred dollars per month, was and is now moot so far as the granting of injunctive relief was and is concerned.

This issue as to the bookkeeper-accountant is the subject matter of Cause No. 196, and, while this issue as to the bookkeeper-accountant has been injected into this Cause in a very technical and limited way, we will contend in this Brief that

such employee (office help) should be treated not only in the same manner as all other employees, that is, as an employee employed in "agriculture" but also as an employee not engaged "in the production of goods for commerce."

SPECIFICATION OF ASSIGNED ERROR

(Cause No. 128)

Petitioner assigns as error the findings and the judgment of the Circuit Court of Appeals that Petitioner's employees are not employed in "agriculture" as that term is defined in Section 3(f) of the Fair Labor Standards Act of 1938, and are therefore, not employees included within the exemption provided by the provisions of Section 13 (a) (6) of said Act. A more detailed statement as to Petitioner's contention is set out in "Questions Presented" below.

QUESTION PRESENTED (Cause No. 128)

WHEN, BY COMMON KNOWLEDGE AND JUDICIAL NOTICE, IRRIGATION, THROUGH THE DIVERSION OF WATER FROM THE PUBLIC STREAMS AND THE APPLICATION THEREOF TO LAND, IS NECESSARY FOR THE PROPER RAISING OF AGRICULTURAL CROPS THROUGHOUT ALL THE SEMI-ARID STATES IN THE WESTERN PART OF THE UNITED STATES, INCLUDING COLORADO AND INCLUDING LANDS OF PETITIONER'S FARMER STOCKHOLDERS, WHICH FACT IN THIS PARTICULAR CASE IS CONCLUSIVELY ESTABLISHED BY THE ADMINISTRATOR'S COMPLAINT, THE STIPULATED FACTS, THE FINDINGS OF THE TRIAL COURT AND THE OPINION OF THE COURT OF APPEALS, *ARE MEN EMPLOYED* BY MUTUAL DITCH COMPANIES, SUCH AS PETITIONER, WHICH ARE ORGANIZED BY THE FARMERS, AS A MATTER OF CONVENIENCE, FOR THE PURPOSE OF SECURING SUCH IRRIGATION WATER, AND WHOSE WORK CONSISTS EXCLUSIVELY OF THE DIVERSION OF WATER OWNED BY THE FARMERS FROM THE PUBLIC STREAMS AND THE MAINTENANCE AND OPERATION OF THE IRRIGATION DITCHES

AND RESERVOIRS AND THE TRANSPORTATION OF THE WATER THERETHROUGH AND THE DELIVERY THEREOF FOR THE RAISING OF AGRICULTURAL CROPS, *EMPLOYED IN "AGRICULTURE"* AS THAT TERM IS DEFINED IN THE FAIR LABOR STANDARDS ACT OF 1938?

QUESTION PRESENTED (Cause No. 196)

WHETHER COLER, PETITIONER'S BOOKKEEPER-ACCOUNTANT, WHOSE WORK IS NECESSARY IN THE CONDUCT OF PETITIONER'S BUSINESS AND TO THE PROPER KEEPING OF PETITIONER'S RECORDS AND ACCOUNTS PERTAINING TO THE ACTIVITIES OF THE PETITIONER AND ALL OF ITS EMPLOYEES IS AN EMPLOYEE EMPLOYED IN "AGRICULTURE" AS THAT TERM IS DEFINED IN THE FAIR LABOR STANDARDS ACT OF 1938, AND IF NOT AN EMPLOYEE EMPLOYED IN "AGRICULTURE", THEN IS COLER, BOOKKEEPER-ACCOUNTANT, AN EMPLOYEE WHO IS NOT ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE"?

The Administrator in his Conditional Cross-Petition for a Writ of Certiorari which was granted on October 11, 1948, certified three very technical questions as to Coler, bookkeeper-accountant, a determination of which would not afford a final and complete answer to the major issue involved in both of these causes, namely: Are all employees, irrespective of whether they are office or field workers of a mutual ditch company as described above, engaged in "agriculture."

We respectfully ask the indulgence of this Court for a determination of the major issue involved in Cause No. 196.

ARGUMENT

Petitioner's employees are employed in "agriculture" and are, therefore, exempt from the provisions of the Act under Section 13 (a) (6) thereof

We will summarize our argument under indicative subheadings.

I.

Courts will take judicial notice of the fact that in the semi-arid regions of the United States (which includes Colorado) agricultural crops are not and cannot be raised without irrigation (supplying land with water by canals, ditches and reservoirs)

To the people of the entire West it is obvious that irrigation by a mutual ditch company is "per se agriculture." We are not here concerned with a matter that is purely local to Colorado or any particular portion of said State, but our problem is one that affects an area that constitutes more than one-third of the entire Nation.

This Court in the case of *State of Wyoming v. State of Colorado et al.*, 259 U. S. 496, 66 L. Ed. 999, 1019, speaking of irrigation in the arid states of Wyoming and Colorado, said:

> "The lands in both states are naturally arid, and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws, and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act, which made reclamation by irrigation a condition to the acquisition. The first settlers located along the streams where water could be diverted and applied at small cost. Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both states. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water

rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught, and values mounting into large figures would be lost."

Again in the case of *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 89 L. Ed. 1815, 1819, this Court said:

> "* * * The river basin in Colorado and Wyoming is arid, irrigation being generally indispensable to agriculture. Western Nebraska is partly arid and partly semi-arid. Irrigation is indispensable to the kind of agriculture established there. * * *"

The majority opinion of the Court of Appeals (R. 130-131) recognized that irrigation, such as we are here involved with, is indispensable to agriculture as evidenced by the following paragraph thereof:

> "Here, agricultural commodities are produced on land irrigated with water furnished by the irrigation company. The agricultural commodities are processed and the finished products move in the channels of interstate commerce. Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land, without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce. The relationship of the employees to the production of the finished products which move in interstate commerce is not objectionably remote or tenuous. Instead, their work is vital and essential to the integrated effort which brings about the movement of the finished products in commerce. It is manifestly clear that the employees are engaged in a process or occupation necessary to the production of goods for commerce, within the meaning of the Act. Reynolds v. Salt River Water Users Ass'n., 143 F. (2d) 863, certiorari denied, 323 U. S. 764; Walling v. Friend, 156 F. (2d) 429;

Meeker Cooperative Light and Power Ass'n v. Phillips, 158 F. (2d) 698; McComb v. Super-A Fertilizer Works, 165 F. (2d) 824."

Additional authorities supporting our position are as follows:

Reynolds v. Salt River, 143 F. (2d) 863
Willey v. Decker, (Wyo.) 73 P. 210
Long on Irrigation, Second Ed., Sec. 3
Coffin v. Left Hand Ditch Co., 6 Colo. 443
Koger v. Woods, (New Mex.) 31 P. (2d) 256
Yunker v. Nichols, 1 Colo. 551, 553
Perkins County v. Graff, 114 F. 441

The following is taken from the opinion of the Colorado Supreme Court in *Yunker v. Nichols*, supra, handed down in 1872 while Colorado was still a territory, and which has been affirmed and reaffirmed as the basis of all subsequent "water laws" in Colorado:

> "In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches cannot be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other

lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provisions for this necessity, by withholding from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. * * *"

In *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. (2d) 863, the Ninth Circuit had under consideration the applicability of this Act to the Salt River Valley Water Users Association which was engaged, not only in irrigation, but in the furnishing of water interstate. No exemption was claimed on account of the agricultural exemption in the Act. However, as applied to the raising of crops in Arizona, the opinion of the Ninth Circuit in this case is replete with applicable statement of facts similar to those in the present case and to facts of which that court took judicial notice and of which we submit this court will take judicial notice as to the relationship of irrigation to agriculture where in Arizona, as well as in Colorado, irrigation is essential to and constitutes an integral part of the production of agricultural crops.

As indicating that the Ninth Circuit in that case would have construed the agricultural exemption in the Act to be applicable if the exemption had been claimed and if the company's operations were limited to irrigation, we quote from the footnote on page 866 of the Federal report:

"Appellee did not make the affirmative plea that its employees were 'employed in agriculture' within the exemption of section 13 (a) (6) of the Act. That question was not raised here or in the court below. It is a question which well may affect the practice and rulings of the Wages and Hours Division of the Department of Labor in the performance of its functions under the Act. 'Our decision is without prejudice to the disposition of the question wherever appropriately presented.' Blair v. Oesterlein, 275 U. S. 220, 225, 48 S. Ct. 87, 89, 72 L. Ed. 249."

II.

The Administrator's contention and the ruling of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce constitutes an effective admission that these employees are employed in agriculture

The majority opinion of the Court of Appeals holds on the basis of the cases cited that Petitioner's employees (except bookkeeper-accountant as to whom no ruling was made) work is so intimately and essentially connected with the production of goods for commerce that those employees are within the general coverage of the Act. It is clear that these employees are not directly engaged in commerce. The holding is that they are engaged in the production of goods for commerce. The Administrator alleges in his complaint (R. 4), which is admitted by Petitioner in its answer (R. 7), agreed to in the stipulation of facts (R. 16-21), found by the trial court in its findings of fact (R. 114-115) and likewise found by the Court of Appeals (R. 128-132) that Petitioner's employees are employed in processes and occupations necessary to the production and in the production of agricultural goods such as "winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye and other commodities". This, we submit, is an admission, agreement and finding that Petitioner's employees produce agricultural goods; whether they are produced for interstate commerce or not, and there is no allegation and no proof and no finding of the Court that any *other goods* have been produced by Petitioner's employees for commerce or for any other purpose. Unquestionably, these goods produced by Petitioner's employees are agricultural goods, which establishes the fact that said employees are employed in agriculture and are exempt from the Act under Section 13 (a) (6).

We submit, therefore, that the holding of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce must necessarily be grounded upon the finding that they are engaged in the production of agricultural goods for commerce, which cannot be anything but agriculture, and must necessarily, for this reason alone, bring the Petitioner's employees within the agriculture exclusion of the Act.

The holding of the Court of Appeals that Petitioner's employees are engaged in the production of agricultural goods and still are not engaged in agriculture, we submit, is illogical, inconsistent and contradictory. If they are within the coverage of the Act at all, it is because they are engaged in the production of agricultural goods. They cannot be engaged in the production of agricultural goods unless they are engaged in agriculture.

III.

The conclusion that Petitioner's employees are employed in agriculture within the meaning of the Act is required, not only by the allegations of the Admiinstrator's complaint, the stipulation of facts, the findings of the trial court and the language of the Court of Appeals as to the nature of the work performed by Petitioner's employees, but also by an analysis of the language of the Act itself and the administrative rules and regulations of the Administrator, which analysis now follows

(a) *Congress used the word "agriculture" as a generic term that includes all activities of persons employed and all practices necessarily employed in the growing of agricultural crops.*

It must be assumed that Congress used the word "agriculture" in a broad sense, not only to include the *activities* of the employees engaged in agriculture, but to include all of the various *practices, processes and occupations* necessarily employed to produce agricultural crops under all of the many different physical, climatic and soil conditions known to exist in the vast expanse of territory over which the Fair Labor Standards Act of 1938 operates, namely, all of the States of the United States, the District of Columbia and all Territories and Possessions (including Porto Rico and Virgin Islands) of the United States. It is unthinkable and insulting to the intelligence of Congress to say that the Act only includes therein, or exempts therefrom, the labor of employees engaged in one uniform, unvarying and static form of agriculture, and by so doing ignore what every intelligent person knows, that there are as many kinds of agriculture, or practices employed therein for the growing of crops, as there are soils, climates and, in Colorado and the West, *water* conditions. Congress knew all of this.

(b) *The Fair Labor Standards Act of 1938 applies*

only to employees engaged in commerce or in the production of goods for commerce, and their activities. It does not apply to employers, nor to their activities.

This Court, in *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. Rep. 1116, reviews the Congressional history of the Act, and says:

> "As passed by the House, the Bill applied to *employers* engaged in commerce in any industry affecting commerce, but the Bill recommended by the Conference applied only to employees engaged in commerce or in the production of goods for commerce.
>
> "Since the scope of the Act is not co-extensive with the limits of the power of Congress over commerce, the question remains whether these *employees* fall within the statutory definition of employees engaged in commerce, or in the production of goods for commerce."

Consequently, it is immaterial who the *employer* of the employees may be, or what kind of an industry the *employer* may be engaged in, when the question of an agricultural exemption is being determined under Section 13 (a) (6) of the Act.

The only pertinent inquiry to be made is that made to ascertain the character of the labor and activities of the *employees*, and if their labor and activities are of an agricultural nature, they, *the employees*, are exempt from the Wage and Hour Provisions of the Act.

(c) *The term "production" as used in different sections of the Act must necessarily have the same meaning.*

Section 3 of the Act (Title 29, Sec. 203) containing the definitions of the different terms used throughout the Act provides

> "As used in sections 201-219 of this title—(which includes the agricultural section, Title 29, Sec. 213)
>
> "(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an

employee shall be deemed to have been engaged in the production of goods if such employee was employed in *producing*, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the *production* thereof, in any State." (Emphasis supplied)

It will be noted that the word "produced", as defined in Section 3 (j) of the Act, is made applicable to that word as used throughout all the Sections of the Act, including Section 3 (f) defining "Agriculture", which reads as follows:

> "(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the *production*, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." (Emphasis supplied)

We submit that a different meaning cannot be given to "production" when used in the same statute and, in fact, in the same section of the statute when Congress expressly stated in the preamble to that section that the defined meaning should be applicable when used throughout the entire statute. It must of necessity logically follow that the word "production" in Section 3 (f) and the same word in section 3 (j) have the same meaning. If, therefore, the work in which Petitioner's employees are engaged is "production" within the meaning of Section 3 (j) so as to bring such employees within the commerce coverage of the Act, that same work must necessarily be "production" within the meaning of Section 3 (f) that excludes such work from the coverage of the Act.

These employees are engaged in only one line of work and as it has been held by the Court of Appeals that this

line of work is the production of agricultural goods for commerce then certainly, both logically and legally, it must follow that they are engaged in the "production" of those same agricultural goods as the word "production" is included in the definition of agriculture in Section 3 (f). The same logical and legal principle and construction which the Court of Appeals felt justified its ruling that Petitioner's employees are engaged in the production of goods for commerce impels the conclusion that they are employed in agriculture.

> (d) *"Agriculture" includes farming in all its branches. Congress intended to give a broad, rather than a limited, construction to its definition of the word "agriculture"*

The first few words of the definition of "agriculture" in Section 3 (f) of the Act states that agriculture includes "*farming in all its branches*". We submit that irrigation is one of the four essential ingredients of agriculture, which, combined, are necessary to constitute agriculture. These are: (1) land; (2) seeds; (3) irrigation; (4) manpower. Without these and each of them there could not be agriculture or agricultural crops in any proper sense of the word in the semi-arid states, such as Colorado, where the application of water, through irrigation, is essential to the raising of crops.

The first words indicating a broad interpretation of agriculture are "agriculture includes farming in all its branches". This broad phrase includes all farm activities in all sections of the United States, and it also includes all the varying methods and practices employed by farmers in all sections of the United States, in order that these farmers may successfully raise crops under all of the diversified climatic and physical conditions that exist in all sections of the United States,—in those that have an over supply of rain, in those that have practically no supply of rain, and in those where rain is not sufficient for the raising of crops without a supplemental supply of water by irrigation. It will be noted that this broad phrase "farming in all its branches" is followed by the words "and among other things includes the production, cultivation, growing and harvesting of any agricultural or horticultural commodities", and so forth. This added clause, where certain activities are enumerated, serves

to emphasize the intent of Congress of giving the words "farming in all its branches" a very broad meaning. The enumeration of the particular activities does not confine the first broad phrase to the particular activities, but rather enlarges the meaning of the first broad phrase, "farming in all its branches".

We submit that the majority opinion is in error (R. 131-132) in holding that the agricultural exemption in the Act should be "narrowly construed" when the Act itself says that agriculture "includes farming in *all its branches*" and when, beyond question, irrigation is some branch of farming. That such a narrow construction of the term "agriculture" should not be applied is the holding of the Second Circuit in *Damutz v. Pinchbeck, Inc.*, 158 F. (2d) 882, 883, where it is stated:

> "Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Different definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

and in the decision of the Fifth Circuit in *U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400, 404, 405, where it is stated:

> "* * * It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections

> of the United States where the act operates. This does not mean, of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. * * * An examination of the cases cited in Words and Phrases, Fifth Series, Vol. 1, p. 339 et seq., under agriculture and in 3 C. J. S., Agriculture, pages 361, 365 and 366; Sec. 1, under 'agricultural' and 'agriculture', convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning."

That a broad interpretation should be given to the term "agriculture" as used in the Act is further indicated by the following taken from the Congressional Record, Volume 83, page 9162, when Senator Thomas from Utah presented the revised bill for approval by the Senate. The following discussion of the agricultural definition took place:

> "Mr. Johnson of California: 'I said that, in general language, agriculture is exempted from the operation of the bill.'
>
> "Mr. Thomas of Utah: 'It is.'
>
> "Mr. Johnson of California: 'Does the Senator know of any particular kind of agriculture that is included in the bill?'
>
> "Mr. Thomas of Utah: 'I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.'"

The following cases, along with those cited above and those hereinafter cited, clearly show that irrigation, not only in Colorado, but in all the semi-arid states of the west, is "agriculture" within the definition set forth in the Act.

Platte-Water Co. v. Northern Colorado Irrigation Co., 12 Colo. 525, 529, 21 P. 711:

"The word irrigation, in its primary sense, is defined 'a sprinkling, or watering;' yet, according to the best lexicographers, it has an agricultural or special signification; 'The watering of lands by drains or channels.' Worcester. 'The operation of causing water to flow over lands for nourishing plants.' Webster. Considering the history of Colorado, the nature of its soil and climate, its constitutional and legislative enactments, as well as the decisions of our courts, we have no hesitation in saying that our legislators used the term 'irrigation' in the acts under consideration according to the common parlance of our people,—in its special sense,—as denoting the application of water to lands for the raising of agricultural crops and other products of the soil."

Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446:

" * * * It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. * * *"

Moyer v. Preston, 44 P. 845, 847, 6 Wyo. 308:

"The soil is arid, and largely unproductive in the absence of irrigation, but, when water is applied by that means, it becomes capable of successful cultivation."

Clough v. Wing, 2 Ariz. 371, 17 P. 453, quoting from the syllabus:

"In Arizona, all the waters of non-navigable streams are devoted to agriculture by means of irrigation."

Barnes v. Sabron, 10 Nev. 217:

"In a dry, arid country like Nevada, where the

rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops. * * *"

(e) *"Agriculture" includes Cultivation and Tillage of the Soil.*

The second line of the definition of "agriculture" in the Act so states. Interpretative Bulletin No. 14 of the Wage and Hour Division (R. 59-81) so states and further states (R. 63):

> "3. The term 'cultivation and tillage of the soil' includes all the operations necesary to prepare a suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil."

Certainly, under the stipulated facts and the findings of the trial court and by way of judicial knowledge, irrigation, including the services of Petitioner's employees in connection therewith, is an operation necessary to prepare a suitable seedbed, etc., within the interpretative administrative ruling of the Wage and Hour Division. An instructive discussion of this question is found in the opinion of the First Circuit in *Bowie v. Gonzales*, 117 F. (2d) 11.

(f) *"Agriculture" includes "production, cultivation, growing and harvesting of all agricultural or horticultural commodities".*

So states the third and fourth lines of the definition of "agriculture" in Section 3 of the Act. In support of this we cite, in addition to the other applicable cases heretofore and hereinafter cited, the following:

Walling v. Rocklin, 44 Fed. Supp. 355
Walling v. Rocklin, 132 F. (2d) 3
Reynolds v. Salt River, 143 F. (2d) 863
Jordan v. Stark Bros., 45 Fed. Supp. 769
Pars. 5 (a), (b), page 5, *Interpretative Bulletin 14* (R. 63).

It will be kept in mind that the reason the Administrator claims that the Petitioner's employees are subject to the Act is because he contends they are engaged in the production *of goods* for commerce. If so, then we submit

that production is the production of agricultural commodities, which is agriculture within the express words of the statutory definition of that term. Again, the Wage and Hour Division in its Interpretative Bulletin No. 14, paragraphs 5 (a) and (b), page 5 (R. 63, 64), expressly so states.

> (g)—"*Agriculture*" *includes all practices performed by a farmer as an incident to or in conjunction with such farming operations.*

Congress again so states in Section 3 (f) of the Act. The courts have likewise so held, as well as the Wage and Hour Division in its Interpretative Bulletin No. 14.

> *Walling v. Rocklin*, 132 F. (2d) 3
> Par. 10, page 7, Interpretative Bulletin No. 14 (R. 65)
> Par. 10, (f), page 9, Interpretative Bulletin No. 14 (R. 67).

(h) "*Agriculture*" *includes "any process or occupation necessary to the production of goods in any State.*" This again is so stated in Section 3 (f) of the Act. It is supported by the authorities.

> *Reynolds v. Salt River*, 143 F. (2d) 863
> *Cook v. Massey*, 220 P. 1088 (Idaho); 38 Idaho 264.

It is specifically alleged in paragraph IV of the Complaint (R. 4) and in the stipulated facts (R. 17, 20) and the findings of the trial court (R. 112, 115, 119, 120).

> (i) "*Produced*" *means "produced, manufactured* * * * *or in any other manner worked on in any state; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing,* * * * *or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state.*"

The above is a quotation from Section 3 (j) of the Act which defines the word "produced" as used in the previous definition of the word "agriculture" in Section 3 (f). Cer-

tainly, irrigation, under the Complaint filed in this action, the stipulated facts, the findings of the trial court, the reported decisions and the court's judicial knowledge, is a "process or occupation necessary to the production" of agricultural products and is, therefore, within the statutory definitions of "agriculture". This is supported by the following, among other cases:

Walling v. Rocklin, 132 F. (2d) 3
Kirschbaum v. Walling, 62 Sup. Ct. Rep. 1116
Jordan v. Stark Bros., 45 Fed. Supp. 769
Walling v. Amidon, 59 Fed. Supp. 294, Dist. Ct. Colo.

(j) *"Goods," as defined by the Act, means "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof."*

Section 3 (i).

If Petitioner's employees are engaged in the production of "goods" for commerce, then clearly agricultural products are "goods" and, as we will now point out, the water furnished for the irrigation of crops is an "ingredient thereof".

(k) *"Ingredient" means that which enters into a compound or is a component part of any combination or mixture; an element; a constituent.*

Webster's Unabridged Dictionary
See discussion in *Walling v. Amidon*, 59 Fed. Supp. 294, Dist. Ct. Colo.

(l) *"Water" is a part and an ingredient of agricultural crops.*

Reynolds v. Salt River Valley Water Users Ass'n, 143 F. (2d) 963.

(m) *All employees who are engaged in "the production of goods for commerce" and who do any of the things included in the definition of the word "agriculture" and referred to under preceding headings are*

necessarily "employees employed in agriculture" and are exempt from Sections 6 and 7 of the Act. Sec. 13 (a) (6) of the Act.

(n) *Irrigation labor is the same as agriculture labor.*
State v. Tiffany, 87 P. 933 (Wash.)
Big Wood Canal Co. v. Unemployment Compensation, 100 P. (2d) 49.
U. S. v. Turner Turpentine Co., 111 F. (2d) 400.

The Idaho Supreme Court in the Big Wood Canal Co. case states:

> "* * * Irrigating the land is as much 'agricultural labor' as is the plowing, grading, and cultivating the land after it is cleared of the sagebrush and greasewood. In the arid regions of the west, water is the vitalizing element of agriculture * * *."

Further analysing the Fair Labor Standards Act of 1938 it is evident that it was passed by Congress:

To regulate "*industries* engaged in commerce or in the production of goods for commerce," for the benefit of workers in such industries. Sec. 2 (a) of Act.

To correct and eliminate the labor conditions referred to in such *industries*. Sec. 2 (b) of Act.

"*Industries*" is defined in the Act to mean " a trade, business, industry or branch thereof, or group of industries in which individuals are gainfully employed." Sec. 3 (h) of Act.

The Administrator of the Wage and Hour Division under the Act is required to appoint an *industry committee* for each *industry* "engaged in commerce or in the production of goods for commerce." Sec. 5 (a) of Act.

In the appointment of the persons representing each of the three groups composing each *industry committee*, the Administrator "shall give due regard to the geographical regions in which the *industry* is carried on." Sec. 5 (b) of Act.

"Agriculture," when spoken of in the Act as being exempt (Sec. 13 (a) (6)), is an *industry*, that is, "a trade,

business, industry, or branch thereof, or group of industries in which individuals are gainfully employed." If agriculture is not such an industry, it is outside of the declared corrective policy of the Act (Sec. 2 (b)), and if outside of the corrective policy of the Act there is nothing in agriculture for the Administrator to correct by injunction proceedings, or otherwise.

Consequently, if this action is to be considered by this Court, it must be because agriculture is an industry (a trade or business) under the declared policy of the Act, engaged in the production of goods for commerce.

The trial court and the circuit court of appeals found that agriculture is an industry, when they held that the employees of petitioner are employed in the production of goods for commerce, namely, agricultural goods.

The Administrator considers that agriculture is an industry under the Act by issuing his exhaustive interpretative Bulletin No. 14, Exhibit 5, entitled "Agriculture" (R. 59 to 81).

In view of the foregoing analysis, it is apparent that, entirely independent of the broad all comprehensive definition of the word "agriculture" (Sec. 3 (f) of the Act), Congress intended to, and did, by Sec. 13 (a) (6) of the Act, exempt from the provisions of Sees. 6 and 7 of the Act every individual that is employed in, or has any part in, the production of goods by an *agricultural industry*, irrespective of who employed him, and irrespective of the activities of his employer.

See *Bowie v. Gonzales*, 117 Fed. (2d) 11, supporting the above analysis of the Act as to agriculture.

IV.

The Colorado Constitution permits the diversion of water from the public streams for agricultural purposes. The decrees entered by the courts of Colorado under the water adjudication statutes have decreed this water for exclusive use for agricultural purposes. This conclusively establishes that the Petitioner's employees while engaged in the diversion of this water from the public streams, transportation thereof through the Petitidner's canals, the storage thereof in the Petitioner's reservoirs, and the distribution thereof from the canals and reservoirs to the farmers for irrigation purposes are necessarily employed in agriculture

Sections 5 and 6 of Article XVI, Colorado Constitution respectively provide:

> "Water, public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
>
> * * * * * *
>
> "Diverting unappropriated water—Priority.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Samples of decrees to Petitioner's canals and reservoirs are attached to "Stipulation and Agreement as to Certain Facts" filed herein as Exhibits 3 and 3A. (R. 40-56).

It will be noted that these decrees only permit the Petitioner (petitioner, under the Colorado laws and court decisions, acts only for and in behalf of the farmers who apply the water to the raising of their crops) to divert the water from the public streams of Colorado for irrigation and agricultural purposes and incident thereto (R. 41, 42, 43, 47, 48, 51, 52, 54.) We submit that, when water from the public streams of Colorado can, pursuant to the constitution and statutes of the State of Colorado and the court adjudication decrees entered under such constitution and statutes, be diverted from the public streams of Colorado only for agricultural purposes, the men who are employed (by whomsoever employed) for the purpose of diverting that water from the public streams and seeing that it gets to

the farmers for use in the production of their agricultural crops are necessarily engaged in agriculture.

V.

The Court of Appeals has misconceived the nature of Petitioner and the relationship of Petitioner and its employees to its farmer stockholders in the production of agricultural crops. Petitioner, as a mutual ditch company, is merely the agent or trustee for the farmers who are the real owners of the water rights, including the ditches and reservoirs, and Petitioner's employees are, in substance, the employees of the farmers

The majority opinion of the Court of Appeals (R. 132-133) grounds its holding that Petitioner's employees are not employed in agriculture within the meaning of that term as defined in the Act because Petitioner "is a corporate entity, separate and distinct from the farmers to whom it furnishes water for irrigation". We submit that even if this be true, Petitioner's employees, nevertheless, are engaged in irrigation, which is agriculture. As stated by this Court in a number of cases, it is the character of work performed by the employees rather than the nature of the employer which determines whether the employee is or is not subject to the Act or is not within one of the exemptions in the Act. *Overstreet v. North Shore Corp.*, 318 U. S. 125, 87 L. Ed. 656, 633, *Kirschbaum Co. v. Walling*, 316 U. S. 524, 86 L. Ed. 1648, *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, 1542, 1544.

However, if the nature of the employee be at all material to the question as to whether Petitioner's employees are employed in agriculture, then we submit that the basic premise of the Court of Appeals that Petitioner is a corporate entity "separate and distinct from the farmers to whom it furnishes water for irrigation" is absolutely erroneous. We most earnestly solicit the careful analysis by this Court of the real nature of Petitioner inasmuch as the Court of Appeals' reversal of the District Court is based upon the above statement.

Admittedly, Petitioner is a mutual irrigation company. The majority opinion of the Court of Appeals so states (R. 132) and then makes no further reference to the facts

or the findings or the law as to what a mutual irrigation company is.

The dissenting opinion, to which we respectfully direct the Court's attention, as well as the opinion of the District Court, (R 99-106) correctly analyzes the nature of a mutual irrigation company.

The facts showing the true nature of Petitioner as a mutual ditch or irrigation company are covered and established by the stipulation of facts upon which this case was tried (R. 11-83). These facts are summarized in the Summary Statement set forth hereinabove, reference to which is here made.

The decisions, not only in the Colorado courts, but in the other western states, as well as the water right textbooks, clearly point out the unique character of mutual ditch or irrigation companies. The following quotation from the opinion of the Colorado Supreme Court in *Beaty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982, 985, is typical of the description of a mutual ditch company in numerous decisions:

> "* * * It definitely appears that this mutual canal company was organized for the convenience of its members in the distribution to them of their water for use upon their lands in proportion to their respective interests. Under these circumstances, the stock certificates of the canal company, in the form in which they were issued and held by the plaintiff, were merely the muniments of title to her water right, which water right, the thing of value owned by her, unquestionably was real estate and not corporate stock. This rule was clearly stated by Mr. Justice Butler in his concurring opinion, in which the majority of the court joined, in the case of Comstock v. Olney Springs Drainage District, 97 Colo. 416, 50 P. (2d) 531, 532 where it is said: 'Counsel for the plaintiff in error admit—and it is the law—that water rights for irrigation are real property. They say however, that shares of stock are personal property. That is true of shares of stock in corporations, including irrigation corporations, organized

> for profit; but where the company is a mutual irrigation company, or, as here, a mutual reservoir company, organized not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right, which is appurtenant to the land upon which the water is used.' See Ireton v. Idaho Irrigation Co., 30 Idaho 310, 317, 164 P. 687, 689. In Kendrick v. Twin Lakes Reservoir Co., 58 Colo. 281, 144 P. 884, we had occasion to pass upon the status of the capital stock of one of the companies involved here. We said: 'The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal, and water rights.'"

The above opinion of the supreme court of Colorado merely follows a long list of earlier opinions holding that a mutual ditch company is merely an agent or trustee for the farmers, who are the real owners of the water rights, including the ditches and reservoirs. *Farmers Ind. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 P. 444; *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30, 32, 36 P. 638; *Comstock v. Drainage Dist.*, 97 Colo. 416, 419, 50 P. (2d) 531; *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 308, 33 P. 144; *Monte Vista Co. v. Centennial Co.*, 24 Colo. App. 496, 498, 135 P. 981; *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884; *Farmers Highline Canal, etc., Co. v. Southworth*, 13 Colo. 111, 21 P. 1028.

The majority opinion of the Court of Appeals (R., 132) erroneously applies to the general concept and nature of a mutual ditch company, such as Petitioner, the principle announced by this Court in *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, that a federal statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts. A mutual irrigation company, such as Petitioner, has its own nature and does not depend upon any mere local or judicial concept. As a

matter of judicial notice, the entire semi-arid western part of the United States raises its agricultural crops primarily through the means of irrigation. Furthermore, only a comparatively few acres of land are in such close proximity to the public streams that an individual farmer can get the water from the streams to his land. This has resulted in the farmers grouping themselves together in the form of mutual irrigation or ditch companies so that by their common enterprise and through the agencies of mutual ditch companies they can construct and operate their ditches and their reservoirs and divert from the streams and apply to their land the water in the public streams which the various state constitutions granted by the federal government provides they shall have the right to divert and apply to irrigation for agricultural purposes.

That a mutual irrigation or ditch company is not a form of operation peculiarly local to Colorado and that such a mutual ditch company is merely a matter of convenience or agency of the farmers in the irrigation of their lands is stated by the leading legal textbooks on irrigation and water rights. Quoting from *Wiel Water Rights in the Western States*, Third Edition, Volume 2:

> "Sec 1266. Mutual Companies—Business not Subject to Public Control.— * * * Mutual Companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rest upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only. Such companies occupy a very great and extensive part of the Western irrigation field. * * *
>
> "Most of the irrigation in Southern California is done under mutual organization, in which each irrigator owns stock. The amount of stock held varies from a fraction of a share per acre to several shares per acre. Somewhat similar organizations are found in large numbers in other parts of California, particularly San Joaquin Valley (although there public service companies predominate). Co-operative organizations of one form or another are largely in

majority in Utah, and some of the most important irrigation systems of Colorado are under similar organization.

"Sec. 1267. Mutual Companies Continued. In Colorado, as elsewhere set forth, the consumer from a company's ditch is held to be an appropriator from the natural stream through the interpediate agency of the ditch, with a result approaching public ownership. Where the water users are numerous there is little difference between mutual companies and general companies under this view. The consumer in Colorado has all the rights of an appropriator as though himself diverting the water from its natural source, and the canal company is only an agent to carry the water to him. This has been held true of mutual companies as of other kinds, so that a stockholder in a mutual company in Colorado may bring suit like other appropriators to change his point of diversion, without the consent of the company. It is held in Colorado that a stockholder in a mutual ditch company may change his place of use so long as other stockholders are not injured, and a by-law to the contrary is invalid where not authorized by charter or expressly assented to by the stockholder. A right represented by a certificate, it has been held, may be lost by non-use, like appropriations from a natural stream.

* * * * * *

"Sec. 1338. The Rule in the Desert States.—* * * The rule of the arid States is that (wholly irrespective of mutual companies in private service) the consumer from a ditch is, through the intermediate agency of the ditch, an appropriator from the natural stream from which the company's ditch heads, and a part owner in the natural resource and in the canal and distributing system. * * *"

To the same effect is *Long on Irrigation*, Section 126, Pages 258, 259 and *Kinney on Irrigation and Water Rights* Second Edition, Chapter 75 Pages 2659, et seq.

The Idaho Supreme Court has well expressed the nature of a mutual ditch company in its recent opinion in *Big Wood Canal Co. v. Unemployment Comp. Division*, 61 Idaho 267, 100 P. (2d) 49, quoted from at some length in the dissenting opinion of Judge Phillips in this case (R. 135-136), from which quotation we extract the following:

> "* * * The fact, that the Big Wood Canal Co. employs and pays the men who tend and maintain the reservoirs and canals, and measure and deliver the water to the farmers, renders them no less laborers in the interest and field of agriculture, since the entire maintenance and operating expense is charged up to and prorated among the various farms and tracts of land to which the water is delivered as an appurtenance. * * * The Big Wood Canal Co. is *not a profit making* corporation; it is merely a medium or instrumentality created to represent the farmers owning water rights from the reservoirs and is doing for them what each one can not do alone for himself.'"

Again, as showing the majority opinion misconception of the nature of a mutual irrigation company, is the comment in *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884, *Comstock v. Olney Springs Drainage Dist.*, 97 Colo. 416, 50 P. (2d) 531, and *Beaty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982. On page 132 the majority opinion refers to these cases only as related to the imposition of special assessments or levying of ad valorem taxes. On the contrary, the important holding of these cases, which are in line with all of those above referred to, is that the farmer appropriator is the owner of the water right, which water right includes the ditches and the canals, and that the ditch company is merely the farmer appropriator's agent, organized as a matter of convenience, to secure his irrigation water. These cases show, what is apparent, that the water right is appurtenant to the land and the ditches and reservoirs are a part of the water right and are, consequently, a part of or appurtenant to the land on which the irrigation actually takes place and the crops are raised.

We most earnestly but respectfully again insist that the majority opinion of the Court of Appeals in this case has misconceived the nature of the Petitioner as a mutual ditch company. While it is technically a corporate entity, it is not, as stated in the majority opinion, "separate and distinct from the farmers to whom it furnishes water for irrigation". Petitioner is not, as stated in the majority opinion, "a company engaged in diverting water, storing water, and delivering water to farmers at their laterals for irrigating lands of the farmers, and in keeping the property of the company in operating condition, all separate and distinct from the farming operations of the farmers" (R. 133). It is true that the ditch riders and lake tenders do not do all of the work necessary to the raising of the crops by the farmer stockholders any more than does an employee who may attend to the horses, or do nothing more than plowing, or nothing more than cultivating, but he is engaged in an essential part of the farmer's activities in raising his agricultural crops. Petitioner is not an independently operated irrigation corporation. It is as stated in the dissenting opinion, "nothing more than a mutual agency organized for the convenience of the owners of land and appurtenant water rights." This necessarily follows from the facts stipulated in this case and found by the trial court and recognized by the decisions of the Supreme Court of Colorado and other states and the water right textbooks.

We submit that, as found by the trial court (R. 120), the Petitioner's employees are, in truth and in fact, through and by reason of the agency of Petitioner for its stockholders, for all intents and purposes, employees of the farmer-stockholders of Petitioner. As stated by Judge Phillips in his dissenting opinion (R. 135) Petitioner's employees "are, in substance, the employees of the landowners."

VI.

Petitioner, its employees and its farmer-stockholders are engaged in one united effort to bring land and water together for the irrigation of agricultural crops and are not engaged in a commercial or industrial activity separate and apart from "agriculture".

Both the Trial Court and the Circuit Court of Appeals in their Opinions clearly show that in the arid states of

the west irrigation of farm lands is "per se agriculture". We do not believe that the Administrator will seriously contend that irrigation of farm lands in the arid states of the west is not "per se agriculture". The Trial Court, also recognized the unity of Petitioner, its employees and its farmer-stockholders, thus supporting its decision in a two-fold manner as follows: (1) Irrigation of farm lands is "per se agriculture" regardless of who does the work; and, (2) The agricultural activity of the Petitioner and its employees is the agricultural activity of the farmer whose lands are made more productive by the application of the water owned by the farmer, but delivered to the farmer through Petitioner's (farmer's) irrigation system. The record herein, as we have analyzed it, shows that the farmer-stockholder is the landowner, and also the owner of the water needed for the irrigation and growing of agricultural crops and that his and their (all farmers) problem is to bring land and water together for the raising of agricultural crops and in order to accomplish that end, he and they have, for their own united convenience, established an agency, namely, the Petitioner, to bring land and water together, which agency in turn employs employees to accomplish that united result. The majority Opinion of the Circuit Court of Appeals fails to recognize this unity and the singleness of purpose between Petitioner, its employees and its farmer-stockholders, and because Petitioner owns no farms and is a corporate entity finds that the agricultural activity (irrigation of farm lands) performed by Petitioner and its employees changes to a commercial or industrial activity. We anticipate that the Administrator in an effort to support the Opinion of the Circuit Court of Appeals will call this Court's attention to the following authorities: *McComb v. Super-A. Fertilizer Works*, 165 Fed. (2d) 824 (C.C.A. 1); *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 101 Fed. (2d) 76 (C.C.A. 9); *Meeker Co-operative Light and Power Ass'n v. Phillips*, 158 Fed. (2d) 698, (C.C.A. 8); and, *Lake Region Packing Ass'n v. United States*, 146 Fed. (2d) 157, (C.C.A. 5.).

It is our opinion that all of the last cited cases are clearly distinguishable from the present dispute because the facts involved in each of the cited cases are in no way

analagous to the facts now presented to this Court in this controversy. In each and every one of the last cited cases the Courts were dealing with established commercial or industrial enterprises whose employees were clearly employed in a commercial or industrial activity, although helpful to the farmer, which has never been classified as "per se agriculture."

In *North Whittier Heights Citrus Ass'n. v. National Labor Relations Board*, supra, on page 80 of the reported decision it is said:

> "Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such and enters a factory for processing and marketing it has entered upon the status of 'industry'. In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.
>
> "Petitioner maintains that the nature of the work is the true test. Perhaps it would more nearly conform to the true test to say that the nature of the work modified by the custom of doing it determines whether the worker is or is not an agricultural laborer."

In *Lake Region Packing Ass'n. v. United States*, 146 F. (2d) 157, the Fifth Circuit in speaking of a farmers cooperative said:

> "* * * For it is quite clear that here, is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation. Because this is so, those acts, which were not performed in the field or in connection with getting the product from the field to the place of processing and *were therefore not per se agricultural, are deprived of their agricultural character by the dominance in the operation of their commercial character.* * * *" (Emphasis ours)

An analysis of the decision in *McComb v. Super-A Fertilizer Works, Inc.*, supra, shows clearly that the Court based

its holding upon the industrial character of the fertilizer company involved in that case as defendant.

It is our position and we believe the position of this Court as evidenced by its many Opinions involving water rights in the western states, that irrigation such as the type that is performed by Petitioner is "per se agriculture" and has never been a commercial and industrial activity that can be treated as separate and distinct from "agriculture."

VII.

Meaning and purpose of Fair Labor Standards Act is clearly expressed by Congress and needs no construction by the Courts but only needs enforcement of its plain provisions.

In the case of *United States of America v. Standard Brewery, Inc.*, 251 U. S. 210, 64 L. Ed. 229, 234, it is said:

> "Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. * * *"

The purpose of the Act as well as its meaning is plain. Congress intended, as it says in the Act, to correct, and as rapidly as practicable to eliminate, certain detrimental labor conditions existing in *industries* engaged in commerce or in the production of goods for commerce, except such industries as "agriculture" expressly exempted. It is also plain from the language of the Act that every employee employed in agriculture is exempt from the Act. It only remains for the Administrator to follow the plain language of the Act and ascertain the character of the labor and activities of each employee and grant the exemption if his labor and activities are of an agricultural nature.

There is no excuse for the Administrator to invoke the well-established rule of a narrow construction of the word "agriculture", that Congress placed in the Act and apply it to the facts in this case, for there is no need of construction. Under the guise of the construction rule, the Administrator asks that this Court *eliminate* from the definition of "agriculture" the word "produced", and from the definition of "pro-

duced," the phrase "or in any process or occupation necessary to the production thereof in any State," and to insert a proviso in the Act, that does not now appear, that any employee who is employed in agriculture shall *not be exempt* if he is doing this agricultural work for, and being paid therefor by, a *mutual ditch company* that is acting as trustee or agent for its farmer-stockholder.

The Administrator issued his Interpretative Bulletin on "Agriculture" (R. 59-80) from which we quote:

> "2. Section 13 (a) (6) of the Fair Labor Standards Act exempts from both the wage and hour provisions any employee employed in agriculture. * * *
>
> "An employee is exempt by virtue of section 13 (a) (6) if, but only if, his work falls within the specific language of section 3 (f). * * *
>
> "* * * Employees engaged in the described operations are not subject to the wage and hour provisions of the act (R. 62-63).
>
> "3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil." (R. 63.)
>
> "5. (a). The term 'production, cultivation, growing * * * of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)' includes all customary operations in connection with raising any 'agricultural or horticultural commodities.' The term 'harvesting of any agricultural or horticultural commodities' includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc. The act, it should be noted, makes no distinction between employees on the basis of the purpose of their employers in producing, cultivating, growing, and harvesting agricultural or horticultural commodities * * *" (R. 63).
>
> "10. The term 'practices (including any forestry or

lumbering operations) *performed by a farmer* * * * as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market' involves many diverse matters. * * *

"It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer. The line between practices which are incident to or in conjunction with farming operations, and those which are not, is not susceptible of precise definition. The agricultural exemption, however, would seem to include only practices which constitute a subordinate and established part of the farming operation * * * (R. 65-66)

* * * * *

"(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption." (R. 67)

This Court in *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 1648, said:

"* * * But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are 'engaged in commerce or the production of goods for commerce', the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirements that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not limit the scope of the statute to the preceding clause

which deals with employees 'in any other manner working on such goods.'"

It is clear from the Administrator's Interpretative Bulletin and from the holding of this Court in the case of *Kirschbaum Co. v. Walling*, supra, as indicated by the quoted remarks above, that each and every portion of each and every section of the Act must be read and enforced in accordance with the plain meaning expressed by Congress.

VIII.

Coler—Bookkeeper-accountant, if not employed in agriculture he is not employed in the production of goods for commerce. (Cause No. 196.)

All parts of our argument heretofore made are in support of our contention that Coler, bookkeeper-accountant of Petitioner, is an employee employed in agriculture. The character of Coler's work in behalf of Petitioner and its farmer-stockholders is described in the Stipulation of Facts (R. 22). In general, he acts as a bookkeeper and accountant, having charge of the Petitioner's books and financial records, showing bank balances, withdrawals and expenditures, and preparing financial statements for the stockholders. He examines and checks the daily diary or work reports from each ditch rider or lake tender and apportions the different expenditures and receipts to the proper accounts. In the absence of the Secretary he has charge of and keeps the records of the assessments paid by the stockholders and the records relating to water deliveries. It was expressly stipulated and also found by the Trial Court that all of Coler's work is necessary in the conduct of Petitioner's business (agriculture) and in keeping a correct account of its records.

As we have pointed out above, if Coler is not an employee employed in agriculture, then, clearly he is not within the coverage of the Act, because not engaged in commerce, or in the production of goods for commerce, or in any process or occupation necessary to the production of goods for commerce. Coler, himself, is an office employee, and has nothing directly to do with the diversion of the water out of the public streams, or in the carriage of the same through the irrigation system, or the distribution of same onto the farmers' lands. The Trial Court specifically found that Coler

is not engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act of 1938 (R. 118). The Circuit Court of Appeals, as indicated above, did not affirm or disaffirm this finding.

In *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538, 1544, this Court said:

> "It is the work of the employee which is decisive."

We submit that the decisions have not and should not go to the extent of holding that an employee, doing the character of work that Coler does, which, only by stretching the imagination, can be said to be related to commerce, and, then only in a very remote degree, should be held to be engaged in commerce or in the production of goods for commerce. However, if it should be held that Coler is so engaged, then the reason must be, and can only be, because he is engaged with Petitioner and all of its employees in a united effort to foster and maintain agriculture.

CONCLUSION

This Court in the case of *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed 1488, 1493, 1496, said: (at page 1493)

> "'Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the Fair Labor Standards Act. *Employment in agriculture is probably the most far-reaching exemption.* * * *'" (Emphasis ours)

(at page 1496)

> "* * * After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

The above quoted remarks of this Court should stand as a beacon light to the Administrator in his application of the Act to "employees in agriculture". If you speak of agriculture to the farmers of the arid states of the west, they immediately visualize an area dotted with irrigation canals and

reservoirs, by and from which the most needed ingredient, water, is supplied to the agricultural crops. Every farmer of the arid states of the west knows that agriculture would exist only in a very limited degree without irrigation and many of the agricultural crops that are now grown in the arid states of the west because of irrigation would not and could not be grown if the land and crops were deprived of water.

We respectfully submit that Petitioner, its employees and its farmer stockholders are joined together as a single unit seeking, by their combined and united efforts, to foster and maintain, in accordance with the universal and customary practices necessarily employed in the arid states of the west, "agriculture".

The decision of the Trial Court based upon the stipulated facts as shown by the record herein should be upheld.

Dated: November, 1948.

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APPENDIX

Sections of Fair Labor Standards Act of 1938 referred to in foregoing brief.

(References are to both the sections of the Act itself and to the same sections as appear in Title 29, U. S. C. A.).

FINDING AND DECLARATION OF POLICY

Title 29, U.S.C.A., Sec. 202.

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

DEFINITIONS

Title 29, U.S.C.A., Sec. 203

"Sec. 3. As used in this Act—

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States, or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(e) 'Employee' includes any individual employed by an employer.

"(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

"(h) 'Industry' means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part of ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

MAXIMUM HOURS

Title 29, U.S.C.A., Sec. 207.

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a work week longer than forty-four hours during the first year from the effective date of this section,

* * * * * * *"

EXEMPTIONS

Title 29, U.S.C.A., Sec. 213

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * * or (6) any employee employed in agriculture; * * *"

PROHIBITED ACTS

Title 29, U.S.C.A., Sec. 215

"Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * * * *

"(2) to violate any of the provisions of section 6 or section 7 or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * * * *"

INJUNCTION PROCEEDINGS

Title 29, U.S.C.A., Sec. 17

"Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., 1934 edition, title 28, sec. 381), to restrain violation of section 15."